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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ADOLPH KIZAS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITIONERS' REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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ARGUMENT

On November 30, 1983, respondents filed a Memorandum in Opposition to the Petition for Certiorari, based on the singular and erroneous assumption that petitioners did not file an application for rehearing with the Court of Appeals. Respondents therefore argued that the Petition for Certiorari in this Court was untimely.[1] The relevant facts, which establish the contrary, are set forth herein.

[1] Respondents' attempt to dispose of this case without addressing the merits of the important legal issues presented therein is indicative of their consistent reluctance to address those issues, which was demonstrated before both the District Court and the Court of Appeals.

On April 26, 1983, the United States Court of Appeals for the District of Columbia Circuit rendered an opinion and issued a decision in *Kizas* v. *Webster*, No. 82-1477. On June 10, 1983, petitioners filed a document entitled "Petition for Rehearing and Suggestion for Rehearing En Banc," pursuant to Rule 40 of the Federal Rules of Appellate Procedure. That petition exceeded by approximately one and one-half pages the 15 page limit set forth in Rule 14(a)(2) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit Local Rules"). Petitioners therefore simultaneously filed a "Motion for Leave to Exceed Page Limitation on Petition for Rehearing and Suggestion for Rehearing En Banc."[2] The petition and motion were filed separately and each was stamped "Received June 10, 1983" by the Clerk of the Court of Appeals. The petition is attached hereto as Appendix H.

The Court of Appeals took no action on either the petition or the motion until August 5, 1983, when it issued orders denying *only* petitioners' motion for leave to exceed the page limitation.[3] Respondents' assertion that no application for rehearing was "filed" with the Court of Appeals, and their conclusion that the Petition for Certiorari in this Court was therefore untimely because the time for filing that petition ran from April 26, 1983, instead of August 5, 1983, is fundamentally flawed.

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[2] Although the D.C. Circuit Local Rules require that motions to exceed the applicable page limitations on briefs be filed prior to the actual filing date for the briefs, that requirement does not apply to petitions for rehearing. *Compare* D.C. Circuit Local Rule 8(h) *with* Rule 14(a)(2).

[3] The court issued two separate orders denying the motion for leave to exceed the page limitation: one as to the petition for rehearing, and one as to the suggestion for rehearing en banc. *See, e.g.*, Appendix E. *See also* D.C. Circuit Local Rule 14(a)(2).

Respondents have assumed, without offering any support, that the denial of a motion to exceed the page limitation for a particular document means that the document was never filed.[4] That argument is foreclosed by the Federal Rules of Appellate Procedure, which provide that:

> Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are *received* by the clerk within the time fixed for filing. . . .

Fed. R. App. P. 25(a) (emphasis added). Courts have long and consistently held that filing is achieved once a document is delivered into the custody of the court. *See, e.g., Ward* v. *Atlantic Coast Line Railroad*, 265 F.2d 75, 80-81 (5th Cir. 1959), *rev'd on other grounds*, 362 U.S. 396 (1960); *Casalduc* v. *Diaz*, 117 F.2d 915, 916 (1st Cir. 1941) (*per curiam*); *Lewis-Hall Iron Works* v. *Blair*, 23 F.2d 972, 974 (D.C. Cir. 1928); *The Washington*, 16 F.2d 206, 208 (2d Cir. 1926).

Respondents do not deny, nor can they, that petitioners timely delivered to the Clerk of the Court of Appeals a petition for rehearing and suggestion for rehearing en banc on June 10, 1983. Nor do they deny that the timely filing of an application for rehearing tolls the time period for filing a petition for certiorari with this Court. *See Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942);

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[4] Indeed, respondents mischaracterize both petitioners' motion and the court's order as requesting and denying "permission" to file the petition for rehearing. *See* Memorandum for the United States in Opposition at 2, n.1. Petitioners never sought leave to file, nor were they required to by D.C. Circuit Local Rule 14(a). Filing of the document was accomplished upon delivery and acceptance by the clerk.

Sup. Ct. R. 20.4. Supreme Court commentators Stern and Gressman have considered the rationale for this rule, stating:

> In this context, finality relates . . . to the finality of the action being taken by the lower court. If a rehearing is sought in the court below, there is no absolute certainty that the judgment below will not be altered. Only when there is such certainty can the judgment properly be made the subject of a petition for certiorari.

R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 399 (5th ed. 1978). Thus, this Court held in *Department of Banking* v. *Pink*, that:

> For the purpose of the finality which is prerequisite to a review in this Court, the test is . . . whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review. . . .

317 U.S. at 268.[5]

Respondents' reliance on *Bowman* v. *Loperena*, 311 U.S. 262 (1940), is misplaced in that the application for rehearing in that case was not timely submitted to the court of appeals. Thus, there could be no consideration of

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[5] In Dep't of Banking v. Pink, relied on by respondents, this Court held that a motion to amend a state supreme court's remittitur did not toll the time period for filing a petition for certiorari to review the state court decision because, "[u]nlike a motion for reargument or rehearing, it did not seek to have the [state court] reconsider any question decided in the case." 317 U.S. at 266. This Court concluded that because the parties sought no alteration of the rights adjudicated, the finality of the lower court's opinion was never suspended. *Id.*

that application by the court. In the instant case, the petition for rehearing was submitted in a timely fashion, considered by the court, and denied, with the court using as a vehicle therefor its refusal to grant petitioners' motion to exceed the page limitation.[6] There could be no certainty prior to August 5, 1983 that the Court of Appeals would not grant rehearing or alter its judgment.

The Court of Appeals here took almost two months to rule on petitioners' motion and petition—substantially longer than it would normally take to rule on a purely procedural motion such as one to exceed a page limitation. Had the court refused to consider the petition for rehearing, it presumably would have acted promptly in denying the motion for leave to exceed the page limitation. Instead, the court considered the application for rehearing until well after the 90 days following the Court of Appeals' initial decision would otherwise have expired, and then issued an order which nominally denied the motion to exceed the page limitation.

Respondents' argument presupposes that timely filing is contingent upon some later action by the court which, if not taken, or if taken in an untimely fashion, may deny litigants important procedural rights. If respondents are correct in their argument, petitioners would have had to prepare and file their petition for certiorari while their application for rehearing was still pending before the court of appeals. That option is foreclosed by the rules of

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[6] Respondents' attempt to apply a hypertechnical, though erroneous, interpretation to the order issued by the Court of Appeals unduly elevates form over substance. As Justice Story long ago observed:

> In the administration of justice, matters of form, not absolutely subjected to authority, may well yield to the substantial purposes of justice.

Minor v. Mechanics' Bank, 26 U.S. (1 Pet.) 46, 62 (1828).

this Court and case law which prohibit review of interlocutory orders of the courts of appeals. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1951); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251 (1916); *American Construction Co.* v. *Jacksonville, Tampa & Key West Railway*, 148 U.S. 372, 384 (1893). *Cf.* Sup. Ct. R. 20.4, 21.1(k)(iii). Petitioners' only alternative would have been to file with this Court an application for an extension of time in which to file a Petition for Certiorari. Such requests are not favored, however, *see* Sup. Ct. R. 20.6, so that even then, the Petition for Certiorari would have had to have been prepared, and possibly filed, while rehearing was pending before the Court of Appeals. Such a procedure defies logic and common sense.

CONCLUSION

Respondents' opposition to the Petition for Certiorari is based on erroneous legal assumptions and totally fails to address the important legal issues presented in the Petition for Certiorari. Petitioners therefore reiterate their request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1477
No. 82-1511

ADOLPH KIZAS, *et al.*,
Plaintiffs, Cross-Appellants,
v.
WILLIAM H. WEBSTER, *et al.*,
Defendants-Appellants.

On Appeal From The United States District Court For The District Of Columbia

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PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC ON BEHALF OF ADOLPH KIZAS, *et al.*

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June 10, 1983

Received
June 10, 1983
Clerk of the United
States Court of Appeals

INTRODUCTION

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, Plaintiffs-Cross-Appellants herewith move and petition the Court for rehearing on the issues set forth herein and suggest that such rehearing should be held *en banc*.

CONCISE STATEMENT OF ISSUE AND ITS IMPORTANCE

Rehearing should be held *en banc* because this case presents facts of first impression with respect to the substantive protection to be accorded entitlements relating to federal employment; vis: whether labor obtained in exchange for a procedural benefit without disbursement of federal funds is property for purposes of the taking clause of the Fifth Amendment.

STATEMENT OF THE POINTS OF LAW AND FACT WHICH THE COURT HAS OVERLOOKED OR MISAPPREHENDED

Point One: The authorities relied upon by the Court to preclude the existence of a vested right to the procedures of the clerk-to-agent program were distinguishable because Congress had there specifically reserved the right to alter or amend the statutory benefit scheme.

Point Two: The Court erred in concluding that the sole source of plaintiffs' property interest was Title V of the U.S. Code because a property interest can arise from a mutual understanding founded upon agency policy and practice when such interest, even if a form of compensation, is authorized and does not require disbursements from public funds.

Point Three: The Court erred in assuming that a federal entitlement could not qualify for substantive protection under the takings clause of the Fifth Amendment.

Point Four: The Court erred in concluding that sovereign immunity was waived in only those instances where the basis of a statutory claim can fairly be interpreted as mandating compensation.

Point Five: The Court misunderstood the nature of the quotas imposed under the New Special Agent Selection System.

Point Six: The Court misunderstood the facts surrounding the case of any member of the plaintiff class who had exhausted administrative remedies.

ARGUMENT

I. The Due Process Clause of the Fifth Amendment has been held to embody "a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society . . . . Due process is that which comports with the deepest notions of what is fair and right and just." *Solesbee* v. *Balkcom*, 339 U.S. 9, 16 (1950) (Justice Frankfurter dissenting).[1]

While it is true that the Fifth Amendment employs two separate clauses to address deprivation and takings,[2] it is also true that the two clauses have had close association throughout history.[3] As Justice Harlan observed, "Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three . . . ." *Poe* v. *Ullman*, 367 U.S. 497 (1961) (Justice Harlan dissenting).

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[1] Due process is violated if a practice or rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[2] *See*, J. Sackman, Nichols' The Law of Eminent Domain § 4.3 (rev. 3d ed. Cum. Supp. 1982).

[3] *See, e.g.*, ch. 39, Magna Carta; ch. 29, Third Reissue of Henry III; 28 Edw. III, c.3; Coke, Institutes of the Laws of England, Part II (London: 1641).

Such concerns are, or ought to be, even more relevant in light of the companion decisions in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Perry* v. *Sinderman*, 408 U.S. 593 (1972), which, together, recognized that state-fostered expectations could create "property" if founded upon a justifiable expectation derived from either "an independent source such as state law," 408 U.S. at 577, or from a mutual understanding created by the government's own actions. *Perry* v. *Sinderman*, 408 U.S. 564 (1972).[4] For, by their very nature, those interests are less concrete than additional notions of property, are subject to a greater potential for abuse, and require, therefore, the most careful protection.

In concluding that plaintiffs were not entitled to compensation for the termination of the clerk-to-agent program, the Court relied on *Flemming* v. *Nestor*, 363 U.S. 603 (1960) and *Richardson* v. *Belcher*, 404 U.S. 78 (1971) to illustrate a purported distinction between a legitimate entitlement and a vested right. Neither supports the use to which that distinction was put by the Court.

In the first instance, both *Flemming* and *Richardson* were decided *before Roth* and *Perry*. It can hardly be said, therefore, that they were ever intended to address those rights which were not even recognized at the time. Furthermore, the Court seriously stretches both authorities beyond their facts.

Both *Flemming* and *Richardson* deal with claimed rights to social security payments. In *Flemming*, the Court upheld a federal statute which suspended social security disbursements to a retired alien who had been deported, finding that there was no accrued interest in such payments. Because Congress had, within the Social Security Act itself, *expressly* reserved the right to amend or repeal the Act, the Court concluded that any expectation of continued benefits could not have been either mutual or legitimate.[5] Far from sanctioning *carte blan-*

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[4] *See, generally*, Reich, *The New Property*, 73 Yale L.J. 733 (1964).

[5] In its decision, finding plaintiffs' expectations here to have been legitimate and mutual, the district court specifically noted the ab-

che in such cases, however, the Court specifically observed that Congress was *not* "free of all constitutional restraint in modifying the statutory scheme." 363 U.S. at 611. Although the Court did not provide examples, subsequent cases held that Congress could not, for example, derive a recipient of similar benefits without procedural due process, *see, e.g., Goldberg* v. *Kelley*, 397 U.S. 254 (1970), or in order to penalize or inhibit the exercise of a constitutional right. *See, e.g., Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

Moreover, *Richardson* itself states (in a passage quoted by the Court) the reason why these cases are inapplicable to the case at bar:

> [T]he analogy drawn in *Goldberg* between social welfare and 'property' . . . cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.

404 U.S. at 81 (citations omitted), *quoted* at Slip Op. 27-28.

The point which was obviously lost upon the Court is that this case *does not* involved "social welfare." Such largesse, gratuitously conferred and sometimes specifically subject to Congressional qualification, may be redistributed or withdrawn at any time for any non-arbitrary reason without giving rise to a substantive claim for compensation based upon the takings clause of the Fifth Amendment. *See, e.g., United States ex rel. Burnett* v. *Taylor*, 107 U.S. 64 (1883).

The interest at issue here is not, however, a mere benefit unilaterally conveyed. Plaintiffs gave their labor at wages below those which they would have received but for the interest given.[6] The situation is similar to that which would arise

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sence of any qualifications to the program as it had been promulgated by the Director.

[6] The undisputed evidence is that participants in the clerk-to-agent program were intentionally assigned grades "below have qualified them." 492 F. Supp. at 1135, *citing* Dawson Dep. at 6-8; Powell Aff. at ¶ 30.

if the government, operating under a system of "workfare" rather than welfare, were to obtain the labor of public benefit recipients and later refuse to pay the workfare benefit. It could modify or terminate the program prospectively, but not retroactively, because entitlement to the benefit of wages would have vested by reason of their labor.

Far from begging that question as charged by the Court, Slip Op. at 19, the district court made specific findings of fact that: 1) there were mutual understandings created by the program established by the Bureau; 2) the Bureau failed to maintain its discretion to grant or deny the benefit of the program; 3) the plaintiffs had been intentionally placed in lower GS positions than they would otherwise have been given but for the preference; and 4) the government had received the benefit of their labor.[7] Based upon these facts, the district court concluded that plaintiffs *had* a *vested* right to the benefits of the clerk-to-agent program—chronological ranking within the Modified Program—because they had earned the benefit which the Bureau created.

The only distinction between plaintiffs here and the hypothetical workfare recipients described above is that plaintiffs were federal employees. As such, it was incumbent upon them to demonstrate that the benefit was one arising from their status as Bureau clerks, rather than from any contractual arrangement. In the realm of federal employment law, one is not entitled to the benefit of a position until he has been duly appointed to it. *United States* v. *Testan*, 424 U.S. 392 (1976). Here, however, there is no question that the clerk-to-agent program was a benefit of the position to which plaintiffs *were* appointed. The preference accorded to plaintiffs was accorded only to those who held plaintiffs' status as clerical employees of the FBI. The employee is entitled to the emoluments of that position until he is legally disqualified. *United States* v. *Wickersham*, 201 U.S. 390 (1906).

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[7] No case cited as similar by the Court involved this set of *proven* circumstances. *See generally* Reply Brief for Appellants at 9-10.

Because the Court of Appeals could find no basis in Title V of the United States Code—which it described as the exclusive source of plaintiffs' compensation rights as federal employees—for the clerk-to-agent program to serve as compensation, it concluded that there could be no entitlement to the program.

Like the earlier reliance on case law, this argument misperceives the district court decision and the facts of this case.

First, exclusive reliance upon Title V ignores the fact that a property interest can be created either by a statute *or* by a mutual understanding between the federal employer and employee as evidenced even by the policies and practices of an agency. *See, e.g., Perry* v. *Sinderman, supra; Colm* v. *Vance*, 567 F.2d 1125 (D.C. Cir. 1975). To require both a demonstration of a government practice of sufficient certainty and duration to meet the standard of *Colm* and a specific enabling authority is to eviscerate *Colm* and to ignore the distinction in the two means recognized by *Perry* in which property interests may be created.

Second, simply because the district court and plaintiffs referred to the clerk-to-agent program as a form of compensation for the reduced grade to which program participants were assigned does not mean that the program was the kind of "compensation" requiring specific statutory authorization. It is clear that the program was, in essence, a procedure. The procedure had "value," to be sure, but it is not the kind of "compensation" to which Title V refers. In the words of the Court, the "incidents" of employee compensation to which Title V governs are "basic salaries; salary increases, overtime, holiday and sick pay; life insurance benefits; retirement benefits; travel and subsistence allowances; and compensation for injury and unemployment." Slip Op. at 20. Title V obviously refers to compensation in the form of dollars; compensation—requiring "disbursement of public money" and "appropriation[s] therefore." 5 U.S.C. § 5536. It does not include the kind of administrative procedures (not involving

appropriations) which the Director had full authority to adopt and promulgate.[8]

The Court's argument might apply where the federal employer acts *ultra vires* in creating an expectation involving public moneys, as where an agency promises to pay an appointee more than the salary schedules allow. It has no application where the expectation created does not involve the expenditure of public funds.

Thus, the district court's analysis of the existence of a property interest is not subject to the criticism to which it was subjected by the Court of Appeals. The Court did precisely what it was supposed to do under the standard analysis. It analyzed the existence of the property interest in terms established by *Perry* and *Roth* and it then proceeded to an analysis of the process due the interest which it believed had been created. *See Goldberg* v. *Kelley*, *supra*.

To the extent that the district court decision can be said to have been unique, it was in its willingness to conclude that the kind of interest the district court believed to exist was entitled to the substantive protection of the takings clause.

"[A] physical takeover of a distinct entity, with an accompanying transfer of the legal powers of enjoyment and exclusive use that are typically associated with rights of property,"

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[8] Neither below nor on appeal did the Government argue that the Director lacked the authority to establish the clerk-to-agent program. Defendants argued, instead, that no property interest could be found to have been created by the program because there was no explicit statement by the Bureau that the preference would continue indefinitely into the future. This argument was considered and rejected by the district court, which held that defendant's conduct "gave plaintiffs every reason to suppose that the preference would continue, and was entirely consistent with the conclusion that the defendants also so understood the policy." App. 121. *See also* (492 F. Supp. at 1148).

Tribe, *American Constitutional Law*, § 9-3, p. 461 (footnotes omitted) is the historic measure of a compensable taking. Traditionally, whether or not a physical invasion had occurred was relatively easy to determine because property itself was physical. *See, e.g., Pumpelly* v. *Green Bay Co.*, 80 U.S. 166 (1871). The more ambiguous was either the interference or the interest itself, the less likely were courts to find a taking to have occurred. *See, e.g., Richards* v. *Washington Terminal Co.*, 237 U.S. 546 (1914). The general principle remained applicable, however, even where public interference with real property was less than absolute. *See, e.g., United States* v. *Causby*, 328 U.S. 256 (1956).

We are not, of course, accustomed to thinking of a "taking" in the field of non-tangible property. We are predisposed, by experience and ease of analysis, to limit such things to the purely physical. Yet our notion of the legal interests which rise to the level of property for purpose of the Fifth Amendment has, since *Roth*, undergone a major transformation requiring that we expand, as well, our ability to conceive of takings. "The body of rules determining which expectations constituted compensable property interests and which do not, plainly requires reconsideration in light of the broader definition of property interests now employed in the law of procedural due process." Tribe at 459, n.11, for "[t]here seems to be no good reason why the broader definition should not be extended to the takings context," Tribe at 459, n.11. Nor does the Court of Appeals provide one. Instead, the Court confuses the question of whether or not there is a waiver of sovereign immunity regarding claims for such a taking with the existence of the substantive right itself.

It has long been established that the United States, as sovereign, is immune from suit save as it consents to be sued. *United States* v. *Sherwood*, 312 U.S. 584 (194). The Tucker Act, upon which jurisdiction in this case is premised, provides that federal courts may exercise jurisdiction for "any claim against the United States founded either upon the constitution . . . or any regulation of an executive department, or upon any

express or implied contract with the United States . . . ." 28 U.S.C. §§ 1346(a)(2) (concurrent jurisdiction in Court of Claims and District Court for claims less than $10,000), 1491 (exclusive *jurisdiction* in Court of Claims for claims in excess of $10,000). Plaintiffs do not now and have never founded their jurisdictional argument upon any express or implied contract with the United States but have proceeded at all times upon the Constitution itself.

In attempting to foreclose such jurisdiction here, the Court of Appeals relied upon the absence of authority for the clerk-to-agent program in Title V to conclude that the basis of the federal claim could not be fairly interpreted as mandating compensation by the Federal Government for the damage sustained. Contrary to the assertion of the Court, however, that is *not* the sole basis upon which jurisdiction may be premised. The standard relied upon by the Court applies only where "plaintiff is not suing for money improperly exacted or retained." *Eastport S.S. Corp.* v. *United States*, 178 Ct. Cl. 599, 607 (1967). In fact, there are, under these circumstances, two bases upon which a claim may be made against the United States: 1) where the basis of the claim "in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained," *or* where the plaintiff is suing for money improperly exacted or retained. *Id.*

Here, defendants have improperly enacted and retained not money from plaintiffs, but their labor; a result which leaves them in the position of having given services for which compensation is yet to be paid.

The real jurisdictional question in this case is whether the district court was correct in concluding that plaintiffs' claim for the value of the labor which was improperly exacted or retained was analogous to a claim for unpaid salary, and laying, therefore, beyond the reach of *United States* v. *Testan*, 424 U.S. 392, 404 (1976). The Court's analysis does not address this issue.

In short, plaintiffs believe that the Court totally misperceived the argument made by plaintiffs and the logic upon which the decision of the district court rests. The Court summarized plaintiffs' case as follows:

> First, they argue that the preference is an element of deferred compensation "due and owing" them. Second, they invoke procedural due process cases to argue that their "legitimate expectation" in receiving the preference transformed the preference into an indefeasible property right.

Slip Op. at 15. That summarization is incorrect. What plaintiffs did argue is that there existed mutual expectations between the Bureau and its clerical employees; that the expectation arose out of their status as Bureau employees; that this mutual expectation created a property interest; that the nature of this interest was such as to require compensation if terminated because plaintiffs had earned the benefit as a result of having been intentionally placed by the Bureau in grades below that which their education and experience would otherwise have entitled them but for the program; and that sovereign immunity was waived by the Tucker Act because their labor had been taken and compensation for services performed was still due and owing. The Court applied to this argument a rigid analysis and reached, in the process, a result which is totally inconsistent with the kind of fundamental fairness which serves as the core of the interests protected by the Fifth Amendment. To permit the government to establish a program; have those who trust the government's representations enter into that program, at grades below which they would otherwise have been appointed; and then permit the government to benefit from their labor yet terminate the very benefit which was used to obtain them is to offend the deepest notions of what is fair, right and just in this country.

As the district court concluded, were a private employer to engage in such a course of conduct, he would not get away with it: the principle of equity and contract would compel a remedy for the aggrieved employees. To the question of whether the

Government should escape liability for the same conduct, the district court emphatically answered: No. Where a private employer is bound by law and equity to honor his contracts, a public employer is bound by the Fifth Amendment to honor the mutual expectations which it creates.

II. Plaintiffs' object to and seek reconsideration of several aspects of the Court's opinion regarding the employment discrimination claim. Plaintiffs note at the outset that the Court's characterization of plaintiffs' claim is fundamentally flawed. The gravamen of plaintiffs' Count II is not the establishment of two new Special Agents selection tracks for women and minorities, *see* Slip Op. at 29, 30, but rather, the Bureau's later implementation of differential scoring that was designed to achieve a fifty percent (50%) representation of women and minorities in Special Agent classes by allowing these two groups to qualify based on substantially lower test scores.[9] The

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[9] The establishment of the two new selection tracks might theoretically have been justified on the ground that the Bureau needed women and minority Special Agents in order to satisfy its job related needs, although plaintiffs maintain that the record in this case prevents any such inference.

Assuming *arguendo* that defendants could support such an inference, plaintiffs continue to maintain that there is tension between judicial interpretations of Title VII and the requirements imposed by the Equal Protection component of the Fifth Amendment with regard to the legal sufficiency of an employer's justification for racial or gender classifications. That tension is unrelated to whether the discrimination is "reverse" or not. *Compare* Reply Brief for Appellants at 17-20; Appellants' Post-Argument Memorandum at 6-10, with Slip Op. at 33.

The Court's citation to a footnote in the Supreme Court's decision in Dothard v. Rawlinson, 433 U.S. 321 (1977), *see* Slip Op. at 34, actually supports plaintiffs' argument insofar as the Court simply acknowledged that the "bona fide occupational qualification" defense to a Title VII suit had to be interpreted at the very least so as to

distinction between these two separate events was amply noted before the district court when defendants attempted to obscure the later change. *See* App. 105.

Defendants also attempted to distort the significance of certain employment statistics to demonstrate *de facto* discrimination. These distortions were amply revealed both to the district court and to this Court, and plaintiffs object to the implication in the Court's opinion that the Bureau may have discriminated against women and minorities and, therefore, that its imposition of racial and gender quotas were justified. *See* Slip Op. at 30 n.91. The historic underrepresentation of women and minorities among the Special Agent classes had nothing to do with discrimination in the selection process. Indeed, these groups fared better than white males *once they applied*, and there has been no suggestion of any barrier to their application for Special Agent classes. The reason for the dramatic under representation of these groups was that they were never recruited by the Bureau, a problem which former Director Kelley sought to alleviate in an appropriate manner—through recruitment efforts aimed at these groups. *See* App. 97, ¶ 6.

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conform to equal protection criteria where state employers are involved.

> The parties do not suggest, however, that the Equal Protection Clause requires more rigorous scrutiny of a State's sexually discriminatory employment policy than does Title VII. There is thus no occasion to give independent consideration to the District Court's ruling that Regulation 204 violates the Fourteenth Amendment as well as Title VII.

433 U.S. at 334 n.20. The issue *not* raised in *Dothard* is precisely the issue raised by plaintiffs here. The Supreme Court's recognition that it would be improper to interpret Title VII so as to minimize the constitutional obligation of government employers regarding nondiscrimination is a far cry from holding that the Title VII mandate has been interpreted in accordance with the equal protection mandate. Plaintiffs maintain that it has not, and that they must therefore be allowed to proceed under the Fifth Amendment.

Plaintiffs are entitled to relief based on the FBI's illegal imposition of racial and gender-based quotas because, regardless of the availability of a remedy directly under the Fifth Amendment, administrative remedies under Title VII were exhausted by a number of plaintiffs' class. The law's statement that:

> no member of the Count II class that named parties now purport to represent, complied with the charge-filing requirements either on time or belatedly,

Slip Op. at 35, is, at best, misleading.

Although plaintiffs' class was not formally certified until May 15, 1979, the class definition established by the district court clearly encompassed Ronald B. Manning. Mr. Manning was, therefore, a member of plaintiffs' class at all times prior to the time at which he was severed for purposes of Count II by order of the court. That severance was effectuated solely because the district court had dismissed plaintiffs' Count II.[10]

Manning's complaint, filed in October, 1978, constituted a timely filing of a discrimination charge by a member of plaintiffs' class,[11] which the Court determined to be the *sine qua non* of a Title VII action in the district court. Manning's charge was denied on December 20, 1978, and an amended complaint in the instant action including charges of employment discrimination was filed on January 16, 1979. Had any named plaintiff in the instant action filed a Title VII administrative charge, it would

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[10] In so doing, the court refused to even address the evidence, discovered belatedly by counsel, that Manning had in fact exhausted administrative remedies by timely filing an employment discrimination charge before the FBI, based on the same facts giving rise to this case.

[11] The fact that Manning was not a named plaintiff in this case is legally immaterial. Exhaustion of administrative remedies by one class member is sufficient, and the case law does not require that that same class member be a named member of any subsequent judicial action.

have been done in precisely the same manner as was Manning's, and would have been given the same consideration before the agency. And once denied, it would have occasioned the same amendment of plaintiffs' complaint that in fact took place.

The Bureau's denial of Manning's administrative charges constitutes exhaustion of administrative remedies.[12]

Date: June 10, 1983

Respectfully submitted,

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[12] As noted previously, neither defendants nor the district court have identified any policy-based rationale for requiring further exhaustion in this case. The initial administrative consideration, which formed a part of the careful blend of remedies in a Title VII action, has already been achieved. And regardless of the Court's concern with the jurisdictional issue presented by a Title VII case in which there was no charge filing, this is not such a case.

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing has been made upon all parties of record by first class mail this 10th day of June, 1983.

Philip L. Chabot, Jr.